STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Markey, Cavanagh, R.P. Griffin)

DAVID SANCHEZ,
Plaintiff-Appellant/
Cross-Appellee

S Ct No 123114

vs.

Ct App No 238003

EAGLE ALLOY, INCORPORATED (self-insured) and SECOND INJURY FUND (Dual Employment Provisions),

WCAC No. 00-0248

Defendants-Appellees/
Cross-Appellants.

ALEJANDRO VAZQUEZ,

S Ct No 123115

Plaintiff-Appellant
Cross-Appellee,

vs.

Ct App No 239592

EAGLE ALLOY, INC. (Cambridge Integrated Services Group),

WCAC No. 01-0182

Defendants-Appellees/
Cross-Appellants.

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PLAINTIFFS' CORRECTED JOINT BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

LIBNER, VanLEUVEN, EVANS, PORTENGA & SLATER, P.C.
By: John A. Braden (P29645)
Attorneys for Plaintiff Vazquez
801 West Norton Avenue, 4th floor
Muskegon, MI 49441
(231) 830-9190

McCROSKEY, FELDMAN, COCHRANE & BROCK, P.C.
By: Gary T. Neal (P 32033)
Attorneys for Plaintiff Sanchez
1440 Peck Street
Muskegon, MI 49443
(231) 726-4861

BLEAKLEY CYPHER PARENT WARREN & QUINN
By: Thomas H. Cypher (P12425)
and James J. Helminski (P63044)
Attorneys for Eagle Alloy
120 Ionia Avenue SW, Suite 300
Grand Rapids, MI 49503
(616) 774-2131

DEPARTMENT OF ATTORNEY GENERAL
By: Victoria A. Keating (P 36890)
Attorneys for Defendant SIF
1200 Sixth Street, Suite 1750
Detroit, MI 48226

MICHIGAN MIGRANT LEGAL ASSISTANCE PROJECT, INC.
By: Teresa M. Hendricks (P46500)
Attorneys for Amici Curiae MMLP, THE NATIONAL EMPLOYMENT LAW PROJECT, WEST VIEW ORCHARDS & CIDER MILL OF ROMEO, and ZYLSTRA GREENHOUSE
648 Monroe Avenue NW, Suite 318
Grand Rapids, MI 49503

LACEY & JONES
By: Gerald R. Marcinkoski (P32165)
Attorneys for amicus Michigan Self-Insurers' Association
600 South Adams Road, Suite 300
Birmingham, MI 48009

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[1] WDCA = Workers Disability Compensation Act, MCL 418.xxx.

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EXPLANATION OF CORRECTIONS

Relying on MCR 7.307(A) (which requires inclusion of only "relevant" portions of the record in an appendix) and 7.308 (which requires inclusion of only parts of the record a party "wants the justices to read"), Plaintiffs' original appendix did not include portions of the record reciting only background or undisputed facts. However, in case a justice nevertheless wanted to look up one of those facts, Plaintiffs' original brief referenced such facts to the *trial* record. That explanation was provided up front (in fn 1 of Plaintiffs' original brief), and the clerk's office raised no objection to that procedure.

However, on March 15, over two months after Plaintiffs' Brief and Appendix had been filed, and after the briefs had been distributed to the justices, the clerk's office sent a noncompliance letter, stating that *all* facts stated in a brief must be referenced to an appendix.[1]

Note that, under the clerk's construction, a party to an appeal must include in an appendix, not only "relevant" portions of the record, and not merely portions the party wants the court to read, but rather *all evidence the party does not wish to be deleted from the record.*[2] If that is the Court's intention, MCR 7.307 and 7.308 should be amended to

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[1] This delay on the clerk's part would work an estoppel, if estoppel applies to enforcement of court rules.

[2] How this can be done with real evidence (such as videotapes) is an interesting conundrum.

explicitly say so, since the current language is ambiguous on that point.

That leaves the question of how to comply with the clerk's directive. Correcting the originals was not possible, because they had already been distributed. Submitting corrected pages was rejected by the clerk, because the corrected pages would not be bound as required by the court rules. That left as the only alternative resubmitting the briefs *in toto*, and that is what Plaintiffs have done.

Of course, the content of the brief had to be modified somewhat to comply with the clerk's directive. Merely adding references to an appendix was not possible, since some of the facts referred to were not contained in any appendix. That left two alternatives: a) striking mention of facts not backed up by evidence contained in an appendix and/or b) supplementing the appendix to add all parts of the trial record referred to in the briefs.

Plaintiffs have used both alternatives, filing a supplementary appendix to add portions of the record referred to herein, and deleting some facts that (we hope) are not essential to decision. The latter alternative explains why the statement of facts herein is shorter than the one in Plaintiffs' original brief. However, all other portions of the original brief have been left alone (except for substituting appendix references for trial record references).

STATEMENT OF CASE

Both Plaintiffs are undocumented aliens who were injured while working at Defendant Eagle Alloy.

Sanchez was not permitted to return to work at Eagle Alloy when it was discovered that his Social Security Number was invalid. He subsequently found work elsewhere, and was employed at the time of the hearing.

Vazquez was terminated for absenteeism, and it was only later discovered that he was an undocumented alien. Vazquez also subsequently found work (though he was unemployed at the time of the hearing).

The common question is whether undocumented aliens who are injured on the job are precluded from receiving workers compensation benefits. The WCAC said not in *Sanchez*, but said "yes" in *Vazquez*. The Court of Appeals held that both plaintiffs were covered by the Act (hence entitled to medical benefits), but were disqualified from receipt of wage-loss benefits under WDCA 361(1) (but, in Vazquez's case, only from the time the employer learned of their undocumented status).

Sanchez seeks affirmance of the open award entered by the WCAC, while Vazquez asks that the closed award entered by the magistrate be opened.

STATEMENT OF QUESTIONS PRESENTED

I. DOES "ALIENS" AS USED IN THE WORKER'S COMPENSATION ACT EXCLUDE UNDOCUMENTED ALIENS?

The Court of Appeals and Plaintiffs say "no."

II. DOES WORKERS COMPENSATION COVERAGE END WHEN A CONTRACT BECOMES ILLEGAL?

Plaintiffs (and, implicitly, the Court of Appeals) say "no."

III. DO MISREPRESENTATIONS NOT RELATING TO THE CONDITION THAT DISABLED A WORKER AFFECT WORKERS' COMPENSATION?

Plaintiffs and the Court of Appeals say "no."

IV. ARE PLAINTIFFS DISQUALIFIED BECAUSE OF COMMISSION OF A CRIME?

Plaintiffs and the WCAC in *Sanchez* say "no."

The magistrate in *Vazquez* and the Court of Appeals say "no" before the employer learned of Plaintiffs' undocumented status, then "yes" thereafter.

A majority of the WCAC in *Vazquez* say "yes."

This issue presents a number of sub-issues:

A. DOES "WORK" IN WDCA 361(1) MEAN *ALL* WORK?

Consistent with *Sington v Chrysler Corp*, 467 Mich 144 (2002), Plaintiffs say "yes."

The Court of Appeals failed to answer this question.

The Court of Appeals split on this issue in *Sweatt v Mich Dept of Corrections*, 247 Mich App 555 (2001), rev'd (by a 3-1-3 decision, which created no precedent) 468 Mich 172 (2003).

B. DOES COMMISSION OF A CRIME HAVE TO BE THE ONE MOST IMMEDIATE CAUSE OF THE UNEMPLOYMENT?

Consistent with *Robinson v Detroit*, 462 Mich 439, 459 (2000), Plaintiffs say "yes."

The Court of Appeals failed to answer this question.

C. DOES "CRIME" AS USED IN WDCA 361(1) INCLUDE SUBSEQUENTLY CREATED CRIMES?

Plaintiffs say "no."

The lower tribunals did not address this question.

D. WOULD DEFINING "CRIMES" TO INCLUDE FEDERAL CRIMES CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF STATE POWER TO CONGRESS?

Plaintiffs say "yes."

The Court of Appeals said "no."

E. MUST COMMISSION OF A CRIME BE DEMONSTRATED BY THE CRIMINAL JUSTICE SYSTEM?

Both Plaintiffs say "yes."

The Court of Appeals said "no."

F. IF DISQUALIFICATION APPLIES, *HOW LONG* DOES IT CONTINUE?

Plaintiffs say only during the time commission of a crime prevented them from working (which in these cases was zero).

The Court of Appeals (and one commissioner in *Vazquez*) would disqualify only from the time that the employer learned of the worker's undocumented status.

Three Appellate Commissioners would disqualify Vazquez ab initio.

V. DOES THE WORKERS COMPENSATION ACT AUTHORIZE COORDINATION OF COMPENSATION PAID BY TWO *MICHIGAN* EMPLOYERS?

Plaintiff Vazquez says "no."

Three members of the WCAC in *Vazquez* said "no" (the other commissioners not addressing the issue).

The Court of Appeals did not address the issue.

STATEMENT OF FACTS

I. SANCHEZ

A. BACKGROUND/ HIRING

In 1989, Plaintiff David Sanchez hired someone to cross the border from Mexico to California (141a[3]). There Sanchez purchased a fake Social Security card (143a). Sanchez also passed a test to obtain a California driver's license (146a).

In 1997, Sanchez came to Michigan and obtained work at Defendant Eagle Alloy (142a).

Sanchez took a Federal "Employment Eligibility Verification" (I-9) form home and had someone help him fill it out (31b). The preparer asked for Sanchez's Social Security number, so Sanchez showed his false card to the preparer (149a). Though a box was checked after the sentence "I attest under penalty of perjury that I am ...a lawful Permanent Resident," Sanchez does not recall the preparer reading that sentence to him (147a). Nor did the preparer read or translate to Sanchez the part of the form that states, "I am aware that federal law provides for imprisonment and/or fines for false statements

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[3] Since there are now four appendices filed in this case, we provide the following list of where appendix-referenced pages may be found:
1a-140a: Plaintiff-Appellants' Appendix
140a out: Defendant Eagle Alloy's Appendix
1b-26b: Defendant SIF's Appendix
27b out: Plaintiff-Cross Appellees' Appendix

or use of false documents in connection with the completion of this form" (148a).

Sanchez was not required to show any identification or work permit before starting work for Eagle Alloy (143a). Rather, about six months later he was asked, along with other employees, to produce a social security card so Defendants could copy it (143a).

In June, 1997, while continuing to work full-time at Eagle Alloy, Sanchez got a full-time job at West Michigan Steel, which meant that he was now working 80 hours per week (27b-28b).

B. INJURY

On September 29, 1998, while working at Defendant Eagle Alloy, a machine closed on Sanchez's right hand, crushing and burning it (so found, 3a).

Sanchez underwent multiple debridement and graft procedures, remaining off work until after his third surgery (4b). At the end of March, 1999, Sanchez returned to work at Eagle Alloy for two hours per day (4b). Sanchez never returned to the *West Michigan Steel job* after the September, 1998 injury (7b) because his injury prevents him from handling two jobs (32b).

Early in July, 1998, Sanchez went off work for two more surgeries (4b-5b).

C. TERMINATION

Meanwhile, on June 16, 1999, the Social Security Administration called Eagle Alloy on the fact that up to 63 of its 250 employees did not have valid Social Security numbers (33b-34b).

When Sanchez arrived at work on August 6, he was sent to Connie Larson's office. He admitted that his Social Security number was invalid, whereupon Larson told him they had to terminate him because of the bad number (6b). Sanchez also admitted to being an illegal alien, and was told he was being terminated for that reason as well (10b, 11b). Defendant also cut off workers compensation benefits.

D. POST-TERMINATION

After being terminated, Sanchez was unemployed until about December 15, 1999, when he got a full-time job at Finish Corporation, where he was working at the time of trial (29b). However, the lifting there did cause hand pain (30b).

E. PROCEEDINGS

1. FIRST MAGISTRATE DECISION

The magistrate found an injury date of September 29, 1998 (3a, 4a) and awarded medical benefits (4a, 17a).

Regarding disability, the magistrate found that Sanchez never returned to full work duties between the injury and his termination and (expressly finding treating Dr. Ford more credible) found that Sanchez continues to be partially disabled (6a, 8a).

Regarding disqualifying misconduct, the magistrate cut off wage-loss benefits as of August 6, 1999, because of commission of a crime under WDCA 361(1) (4a). Without citing any statutes, the magistrate cited Sanchez's "being an illegal alien" (4a, 16a); working without a valid social security card or work visa (15a); not legally residing in the U.S. (15a)

and not being able to be legally employed in the U.S. (15a).

2. FIRST WCAC DECISION

On appeal, because no one challenged the award of medical benefits and wage-loss benefits to August 6, 1999, the Workers Compensation Appellate Commission affirmed those awards (27a). Moreover, the WCAC majority affirmed the magistrate's finding that Sanchez's undocumented status did not negate a contract of hire (29a). The WCAC also held that presenting forged documents was not the type of misrepresentation that is disqualifying under Michigan's Workers' Compensation Act (31a-32a).

However, the WCAC majority disagreed with the magistrate in two respects. It held that WDCA 301(5)(e) does not apply (38a); and that, because being an undocumented alien is a civil, not a criminal, offense, WDCA 361(1) disqualification does not apply (40a).

While retaining jurisdiction, the WCAC remanded for a determination of whether Sanchez is disqualified under *Haske v Transport Leasing, Inc*, 455 Mich 628 (1997) (40a) (which contained *dictum* that wage loss must be causally related to the on-the-job injury).

3. SECOND MAGISTRATE OPINION

On remand, the magistrate reaffirmed the finding that Sanchez remains disabled (47a); found that Sanchez did not refuse favored work, per WDCA 301(5)(a) (45a); and held that *Haske*'s injury-causing-wage-loss requirement does not apply where, as here, the post-injury work is "reasonable employment" (45a-46a).

4. SECOND WCAC DECISION

After remand, the Appellate Commission in a 2-1 decision affirmed the magistrate's findings that Sanchez did not refuse work under 301(5)(a) (53a), and that Sanchez is still disabled (52a). Moreover, the WCAC held that any injury-causing-wage-loss requirement was satisfied, since Sanchez's inability to earn as much post-injury was due, in part, to his hand injury (52a).

II. VAZQUEZ

A. BACKGROUND

Plaintiff Alejandro Vazquez entered the United States opposite Tijuana (whether legally or illegally is not stated) (163a).Vazquez purchased forged Social Security and resident alien cards, using them to obtain work at Defendant Eagle Alloy on April 9, 1998 (161a, 163a, 164a).

B. INJURY AND TERMINATION

On or about January 27, 1999, because someone else was using the hydraulic lift, Vazquez lifted one of the a heavy pieces from a basket on the floor and experienced pain in his left shoulder (so found, 66a).

On April 7,Vazquez was terminated for an unexcused absence (44b).

C. POST-TERMINATION EVENTS

Connie Larson (the employee of Defendant charged with finding favored work) admitted that no efforts were made to provide Vazquez with favored work from April to

June, 1999, because of a company policy not to offer favored work to workers after they are fired (44b-45b).

In a letter dated June 16, 1999, the Social Security Administration notified Defendant that the Social Security numbers used by Vazquez and 62 other workers at Eagle Alloy may be false (34b). On October 16, 1999, Defendant's counsel learned via a letter from Vazquez's counsel that Plaintiff was undocumented (43b).

Meanwhile, Vazquez got several jobs Through Olsten Temporary Services (the record not stating what documents he presented, if any, to get those jobs):

- Integrated Metal Technology from July 30, 1999 to August 31, 1999, which Vazquez left because the job involved lifting and aggravated his shoulder symptoms (35b).
- Donnelly Corporation from November 15 through December 13, 1999, which did not bother his shoulder (35b);
- Grand Haven Stamped Products for two days in February, 2000, which did not bother his shoulder (36b);
- Meridian for one day, which did not bother his shoulder (38b);
- Grand Haven Plastics from February 23 through March 11, 2000, which did not bother his shoulder (36b);
- Assembly Tech in March, which did not bother his shoulder (36b-37b);
- Dymet for one week, which did not bother his shoulder (37b). Vazquez lost this job because Olsten discovered Vazquez was undocumented (38b).

Vazquez found work through Kelly Services on July 5, 2000, being placed at Gyro Powder Coating in Grand Haven (38b). He worked hanging parts on a line to be painted, which bothered his shoulder, so he left after less than two weeks (39b).

Finally, In November, 2000,Vazquez worked through Wise Temporary Services at Fleet Enterprises (39b). The job did not bother his shoulder (40b). Vazquez was laid off after two days, and, although still registered with Wise, has not been called to work within his restrictions (40b-41b).

D. MAGISTRATE DECISION

Expressly finding treator Pallante credible (66a), the magistrate found, as a fact, that Vazquez continues to be disabled (59a, 67a) from an on-the-job separation of the left acromioclavicular (AC) joint occurring on January 27, 1999 (58a, 66a); that Vazquez was Defendant's employee when the injury occurred (59a, 70a); and that Vazquez's firing was not disqualifying (71a).

The magistrate further awarded medical benefits, but cut off wage-loss benefits on October 16, 1999, the date Vazquez's undocumented status was confirmed (59a). The magistrate reasoned that, because of Vazquez's illegal status, his unemployment was caused by "commission of a crime" per WDCA 361(1) (72a).

E. WCAC DECISION

The Workers Compensation Appellate Commission heard the case *en banc*. In three opinions, the Commission held that Michigan's Worker's Compensation Act covers

undocumented aliens (Witte, Leslie, Wyszynski and Kent), but disqualified Vazquez from receiving wage-loss benefits because of WDCA 361(1) (Przybylo, Martell, Skoppek and Kent).

A majority could not agree on whether fraud in the inducement rendered the contract void ab initio (only Martell, Skoppek and Kent would so hold), nor on the *duration* of 361(1) disqualification: Commissioners Przybylo, Martell and Skoppek would disqualify ab initio, whereas Commissioner Kent agreed with the magistrate that 361(1) qualification runs only from the time the employer learns of the commission of the crime.

III. COURT PROCEEDINGS

In a consolidated opinion, the Court of Appeals held that a) undocumented aliens are covered "employees" under Michigan's Workers Compensation Act (127a); b) misrepresentation of one's social security number to get a job is not disqualifying misconduct (129a), but c) the fact that it would be illegal to employ plaintiffs in the United States disqualified them under WDCA 361(1), from the date the employer learned of their undocumented status (132a-133a).

The Supreme Court granted Plaintiff's Application for Leave to Appeal and Defendant's Cross-Application, directing that the parties brief, inter alia,

1. Whether there was a contract of hire;

2. What is included in the word "aliens";

3. Whether Plaintiffs' unemployment was because of a crime; and

4. Whether there was any justification for the date chosen for cutting off benefits (134a).

ARGUMENT

I. "ALIENS" (AS USED IN THE WDCA'S DEFINITION OF "EMPLOYEES") INCLUDES UNDOCUMENTED ALIENS

STANDARD OF REVIEW: This is a legal question. Legal questions are reviewable *de novo. Beason v Beason,* 435 Mich 791, 804-805 (1990).

The Michigan Workers Disability Compensation Act has extensive provisions defining who is and is not an employee under the act. The basic definition is WDCA 161(1)(*l*), which includes as employees "Every person in the service of another, under any contract of hire, express or implied, including aliens."

Defendant argues that "aliens" impliedly means "legal aliens." Logic, grammar and controlling rules of statutory construction belie that assertion.

As a matter of logic, if "aliens" means "legal aliens," then the term "legal aliens" would be redundant, while the term "illegal aliens" would be nonsensical (as meaning "illegal legal aliens").

As a matter of grammar, describing a class without limiting adjectives includes *all* things belonging to the class, and not just some. *Sington v Chrysler Corp*, supra at 467 Mich 159 ("work" as used in WDCA 301(4) means *all* work, not just some jobs). So, WDCA 161(1)(*l*)'s reference to "aliens" means *all* aliens, not just documented ones.

In addition, MCL 8.3a requires that words in statutes be given their "common and

approved usage."[4] One finds the "common and approved usage" in dictionaries. *Robinson v Detroit*, *supra* at 462 Mich 456, n 13. The dictionary defines "alien" as "somebody who is a citizen of a country other than the one in which he or she lives or happens to be." *Encarta World English Dictionary* (New York: St. Martin's Press 1999). Neither this nor any other definition says or implies that the person must have documentation in order to called an "alien." Consequently, the "common and approved" usage of "aliens" includes both documented and undocumented aliens.[5]

> We begin by examining the plain language of the statute. Where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed - no further judicial construction is required or permitted, and the statute must be enforced as written.

Dibenedetto v West Shore Hospital, 461 Mich 394, 402 (2000).

Even if we the word "alien" were ambiguous, it is settled that a statute should be construed in accordance with its evident purpose. Where that purpose is to create a remedy, ambiguities should be resolved in a way that furthers the remedy. *Shannon v*

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[4] "All words and phrases shall be construed and understood according to the common and approved usage of the language"

[5] Whether undocumented aliens *should have been* excluded from Workers' Compensation Act is a policy question which is entrusted to the Legislature, not to the courts. *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 759 (2002).

Moreover, the language controls, even if the result is considered "absurd" or "illogical" by some. *Robertson* at 465 Mich 758. If a statute has that result, the remedy is with the Legislature who created the statute.

People, 5 Mich 36, 48 (1858). Since the obvious purpose of the Worker's Compensation Act is to create a remedy for injured workers, any ambiguities must be resolved in favor of the remedy. *Deziel v Difco Laboratories*, 403 Mich 1, 33-35 (1978). In the case at bar, that means construing "aliens" broadly, to include undocumented aliens.

II. A CONTRACT OF HIRE NEED NOT BE LEGAL

STANDARD OF REVIEW: This is a legal question. Legal questions are reviewable *de novo. Beason v Beason, supra,* at 435 Mich 804-805.

A. "CONTRACT" AS USED IN WDCA 161(1)(*l*) IS NOT LIMITED TO LEGAL CONTRACTS

WDCA 161(1)(*l*) requires that there be a "contract of hire." Defendant argues that this implicitly means a *legal* contract of hire.

The points made in Argument I applies equally to this issue:

1. As a matter of logic, if "contract" means "legal contract," then the term "legal contract" would be redundant, while the term "illegal contract" would be nonsensical (as meaning "illegal legal contract").

2. As a matter of grammar, describing a class without limiting adjectives includes *all* things belonging to the class, and not just some. *Sington v Chrysler Corp, supra* ("work" as used in WDCA 301(4) means *all* work, not just some jobs). So, WDCA 161(1)(*l*)'s reference to "contract" means all contracts, not just legal ones.

3. The dictionary, "common and approved" definition of "contract" is "An agreement;

a mutual promise." Stormonth, *A Dictionary of the English Language* (New York: Harper & Bros, 1885).[6] Since that definition does not purport to exclude illegal contracts from its scope, the "common and approved" usage of "contract" includes both legal and illegal contracts.

4. Even if we the word "contract" were ambiguous, to fulfill the remedial purposes of the Act, such ambiguity must be resolved in favor of workers compensation coverage.

B. THE CASE LAW AFFIRMS THAT ILLEGAL CONTRACTS ARE COVERED

Defendant's argument also proves too much. If a contract must be legal to entitle the worker to compensation, an injury on a Sunday would not be compensable when "Blue laws" were in effect. The case law was otherwise. 1C Larson, *Workmen's Compensation Law* Sec. 47.54 (attached). If a contract must be legal, an elected official illegally holding another government job would not be entitled to compensation when injured in the latter job. The court held otherwise in *Webber v Midway*, 205 Pa Super 464, 211 A 2d 45 (1965). Last but not least, if only legal contracts are covered, then minors employed illegally would not be entitled to compensation for workplace injury. The authority holds otherwise. Larson *supra*, at Sec. 47.52(a).

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6 Since we are construing a word used by the Legislature in 1912, it would seem that a dictionary issued before 1912 would be a surer guide to legislative intent than modern dictionaries.

Rather than illegality of a contract vitiating compensation coverage, the established rule, even before the undocumented alien question arose, is that, while workers compensation may not be payable when one contracts to perform *illegal acts* (e.g. murder for hire), so long as the *work performed* is legal, it matters not that the employment contract violates some law. Larson, *supra,* at Sec. 47.51. Consistent with this principle, the weight of authority holds that illegality of the contract to employ an undocumented alien does not preclude an award of workers compensation. *Dowling v Slotnik*, 244 Conn 781, 712 A 2d 396 (1998); *Fernandez-Lopez v Jose Cervino, Inc*, 288 NJ Super 14, 671 A 2d 1051, 1054 (1996); *Mendoza v Monmouth Recycling Corp*, 288 NJ Super 240, 672 A 2d 221, 225 (1996). The one case *contra*[7] (from Virginia) contradicts the general rule, seems more a product of anti-foreigner nativism than of sound legal reasoning, and is no longer good law even in Virginia, having been legislatively overruled. Va Code Ann 65.2-101.

C. PLAINTIFFS' CONTRACTS WERE NOT ILLEGAL

The Federal Immigration Reform and Control Act (IRCA) does not make it illegal to employ undocumented aliens, period, but rather makes it illegal to *knowingly* do so. 8 USC 1324a(a).[8] In the case at bar, since the employer did not learn of Plaintiffs'

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7 *Granados v Windson Development Corp,* 257 Va 103; 509 SE2d 290 (1999).

8 "(1) It is unlawful for a person or other entity - (A) to hire, or to recruit for a fee, for employment in the United States an alien *knowing* the alien is an unauthorized alien... (2) It is unlawful for a person or other entity, after hiring an alien for employment in

undocumented status until after the injuries in question, the contracts of hire were legal to that point. Since the contract of hire requirement obviously has reference to the time of injury, that the contract might become illegal after the injury date is legally immaterial.[9]

In short, even if we were to rewrite the Workers Compensation Act to insert "legal" before "contract of hire," such a "legality" requirement would be satisfied, since the contracts involved in the case at bar were legal when made and when Plaintiffs were injured.

III. MISREPRESENTATIONS NOT RELATING TO AN OCCUPATIONAL DISEASE THAT LATER DISABLES THE WORKER DO NOT VITIATE WORKERS COMPENSATION COVERAGE

STANDARD OF REVIEW: This is a legal question. Legal questions are reviewable *de novo. Beason v Beason,* supra, at 435 Mich 804-805.

Although Plaintiffs misrepresented, inter alia, their Social Security numbers when starting work for Defendant, no provision of Michigan's Act disqualifies a worker merely because he is a "bad person" or does bad things. On the contrary, the Act disqualifies

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accordance with paragraph (1), to continue to employ the alien in the United States *knowing* the alien is (or has become) an unauthorized alien with respect to such employment." (Emphasis added).

[9] Even as a termination or extinguishment of a contract of hire post-injury does not affect a worker's right to compensation. *Russell v Whirlpool Financial Corp*, 461 Mich 579 (2000).

only in discrete, narrowly drawn situations: 301(5) (refuse reasonable employment), 385 (refuse IME), 319 (violation of rehab order), 305 (misconduct causing injury), 361(1) (commission of crime) and 431 (misrepresentation).

The last-cited provision disqualifies a worker who misrepresents the existence of an *occupational disease* that later *disables* the worker. Under the rule *expressio unius est exclusio alterius*, the Legislature's choosing to make fraud disqualifying in that situation implies an intent *not* to disqualify for fraud in *other* circumstances. *Dressler v Grand Rapids Die Casting Corp,* 402 Mich 243, 255 (1978). In particular, since misrepresentation of one's Social Security number are unrelated to a condition that disables the worker, such misrepresentations are not disqualifying. *Granados v Windson Development Corp, supra,* at 509 SE2d 292; *Dowling v Slotnik, supra*, at 412 A2d 413.

WDCA 431 shows that the Legislature knows how to make fraud disqualifying when it wants to. The fact that it inserted no similar provision covering the fraud involved in the case at bar shows that the Legislature did not want to disqualify workers for such fraud. Given express legislation on the topic, it would be judicial legislation to create the disqualifying fraud provision Defendant advocates.

IV. PLAINTIFFS ARE NOT DISQUALIFIED UNDER WDCA 161(1)

A. SUMMARY OF ARGUMENT

Plaintiffs are not disqualified under WDCA 161(1) because a) Defendant failed to prove that b) the criminal justice system established that c) Plaintiffs (as opposed to their

employer) d) had committed (as opposed to *might* commit) e) any Michigan (as opposed to Federal) offenses that f) were crimes as of 1985 (when the disqualification provision took effect); nor that any such crimes were g) the one most immediate, efficient, and direct cause of h) Plaintiffs' inability to perform *all* work.

B. ANALYSIS OF STATUTORY LANGUAGE

The last sentence of WDCA 361(1) provides,

> However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

1. "COMPENSATION UNDER SECTION 351, 371(1), OR THIS SUBSECTION"

WDCA 351 provides for weekly *wage-loss* benefits for *totally* disabled workers. "This subsection" (361(1)) provides for weekly *wage-loss* benefits for *partially* disabled workers. WDCA 371(1) provides for weekly *wage-loss* benefits.

It follows from the express statutory language that disqualification under WDCA 361(1) applies only to *weekly wage-loss benefits*, and so has no effect on medical benefits (315), specific loss benefits (361(2)), death benefits (321), nor total and permanent disability benefits (361(3)). At a minimum, then, the Court of Appeals erred in not affirming the plaintiffs' award of medical benefits.

2. "FOR SUCH PERIODS OF TIME THAT"

By inclusion of this phrase, the Legislature unambiguously provided that disqualification under WDCA 361(1) is not permanent, but lasts only as along as the situation described by that subsection exists. Since whether the situation exists may change over time, it follows that analysis under WDCA 361(1) requires a chronological analysis, looking at each successive event to determine what effect, if any, it has on disqualification (which we will do in Arguments IV.B and IV.C).

3. "WORK"

The Court of Appeals has split on what "work" means in WDCA 361(1). *Sweatt v MDOC, supra,* at 247 Mich App 565 (all work, per Neff), 577 (some work, per Griffin). However, more recently the Supreme Court has held that "work" means *all* work. *Sington v Chrysler Corp, supra* at 467 Mich 157 (employee "disabled" only "if the employee is no longer to perform *any* of the jobs that pay the maximum wage"; emphasis added), 159 ("301(4) requires a determination of...earning capacity in *all* jobs..." emphasis added). Accord, *Peck v GMC,* 164 Mich App 580 (1987), lv den 431 Mich 872 (1988), rec den 433 Mich 879 (1989) ("work" in WDCA 373(1) means *all* work).

Indeed, *Sington* stands for the proposition that work *unambiguously* means all work since, if there were any ambiguity, the Court would have had to apply rules of construction (including the rule that ambiguities in the Workers Compensation Act are resolved in favor of coverage), which it did not do.

In short, applying the plain English of the statute, "work" as used in WDCA 361(1) means *all* work. Thus, 361(1) does not disqualify unless commission of a crime forecloses *all* work to the worker.

Conversely, if the word "work" were considered ambiguous, one would have to turn to rules of construction. The most pertinent such rules provide,

1. Penal provisions should be narrowly construed. *Gilbert v Kennedy,* 22 Mich 5, 19 (1870). Since disqualification from receipt of wage-loss benefits because of commission of a crime is penal, any ambiguities should be resolved against application of 361(1).

2. Remedial statutes should be liberally construed. Since the Workers Compensation Act is such a statute (replacing the lottery of tort liability with a surer remedy of economic benefits without regard to fault), and denying compensation would thwart the Act's purpose (to ensure that costs of work-related injuries are borne by the employer who benefitted from the worker's labor), any doubt should be resolved in favor of compensability. *Deziel v Difco Laboratories*, supra at 403 Mich 33-35.

Both rules of construction call for construing "work" in WDCA 361(1) as meaning *all* work. See *Weathersby v Grand Rapids,* 1992 WCACO 111 (No. 35, Jan. 24), aff'd Ct App No 171272 (1994), lv den 447 Mich 1003 (1994) (though Defendant's policies preclude employing one charged with a crime, the crime is not disqualifying where it does not preclude the worker's working elsewhere).

4. "BECAUSE OF"

WDCA 361(1) requires, not merely that a crime be proven, but also that the employee be out of work "because of" the crime. So, for example, that an employee might have shoplifted and gotten a suspended sentence has no effect on the employee's right to workers' compensation benefits, if he lost his job because of a layoff, or an on-the-job injury.

That leaves the question of which standard of causation applies. There are at least four different levels (starting with the most lax):

1. *"But for" causation.* This encompasses *multiple* causes and *remote* causes. However, it is not entirely toothless: something still must have "made a difference" to be a "but for" cause. *Matras v Amoco Oil Co,* 424 Mich 675, 589 (1986).

2. *"Arising out of" and "substantial factor."* These are the "but for" standard, with the added requirement that *trivial* "but for" causes are insufficient. *Thornton v Allstate Ins Co,* 425 Mich 643, 659-660 (1986); *People v Wells*, 419 Mich 927, 930 (1984).

3. *Proximate cause.* This standard is "but for" causation with the added requirement that the results be reasonably foreseeable. *Nielsen v Stevens, Inc*, 368 Mich 216, 220-221 (1962). Although this standard also embraces multiple causes, it excludes remote causes (i.e., where the chain of "but for" causation is broken by the intervention of an unforeseeable cause).

4. *"The" proximate cause.* This has been defined as "the one most immediate, efficient,

and direct cause preceding an injury." *Robinson v Detroit, supra* at 462 Mich 459. This standard excludes, not merely remote causes, but even foreseeable intervening causes. *Robinson, supra* (though a suspect fleeing the police is highly foreseeable, it still breaks the chain of causation, making the policeman's chase not "the proximate cause" of the suspect's crashing).

While certain words imply certain causal standards, the form of words is often of secondary importance. Thus, "the proximate cause" is sometimes construed as meaning "a proximate cause"[10] and other times as creating a more exacting standard (as in *Robinson, supra*). Indeed, even language as apparently lax as "resulting from" has been held to create an exacting standard equivalent to "the proximate cause." *Robinson, supra,* at 462 Mich 456-457 and fn. 14 (Since "resulting from" is more stringent than even "proximate" cause, suspect's crashing car did not "result from" police pursuit).

In the end, the causal standard created by a statute turns less on the particular language used than it does on the rules of construction brought to bear.

The rules of construction applicable to the statute in question are clear: In order to serve the Act's purposes (to ensure that costs of work-related injuries are borne by the employer who benefits from the worker's labor), any ambiguities in the Act should be resolved in favor of rather than against coverage. *Deziel v Difco, supra.* Moreover, WDCA

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10 *Hagerman v Gencorp Automotive*, 457 Mich 720, 729-734 (1998).

361(1) is a penal provision, and penal provisions should be narrowly construed. *Gilbert v Kennedy, supra.*

These rules of construction call for the narrowest construction of "because of" that the language will permit. *Cf. Chandler v Muskegon County,* 467 Mich 315 (2002) (to serve the purpose of Governmental Liability Act, the court will apply the most restrictive definition possible of "motor vehicle"). Since "resulting from" was defined in *Robinson v Detroit* as "the one most immediate, efficient, and direct cause," the same definition should be applied to "because of" as used in WDCA 361(1).[11]

5. "COMMISSION OF A CRIME"

a. Commission by Whom

WDCA 361(1) is ambiguous, in that it does not say *whose* crimes are relevant to disqualification. Since it would be absurd to disqualify a worker because of a crime committed by *someone else* (a coworker or employer), "commission of a crime" means crimes committed *by the employee seeking benefits.*

b. Actual Versus Potential Commission

While the basis for disqualification is clear where a worker has *actually committed* a crime (and is fired from or denied a job because of it), some of the judges below imply that actual commission of a crime is not needed: that it is enough if a crime *would be*

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[11] Note that, if Defendant did not prove causation under an even more lax standard, it would be unnecessary to decide whether a more stringent standard applies.

committed, were the worker to apply for or obtain certain types of work (namely, work in the U.S.).

There are two flaws in this theory. First, there is no support in the language of the statute for it: WDCA 361(1) says "commission," not "potential commission" of a crime.

Moreover, a "potential commission" theory expands WDCA 361(1) beyond all reason. Take the case of a *legal* alien, who is here on a work visa. Such visas typically are limited to particular employers, making employment by other employers illegal. If such a legal alien is injured while doing the *legal* work he was supposed to be doing, a "potential commission" theory would deny compensation because it would be illegal for him try *other* work in the U.S.

Nor would a "potential commission" theory affect only aliens. Take an *American citizen* who is not licensed to be a physician, C.P.A., barber or real estate broker. Since such a worker would necessarily commit a crime if he were to apply for or obtain work for which he was not licensed,[12] reading WDCA 361(1) as covering potential as well as actual commission of a crime would mean that all such unlicensed workers would be disqualified.

Although the "license" an undocumented alien lacks covers a broader range of jobs than the professional or occupational license most workers lack, the difference is one of

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12 MCL 333.16294 (physician); MCL 339.707 (C.P.A.); MCL 339.601 (state licensed occupation such as barber or real estate agent).

degree, and the principle is the same: if undocumented aliens are disqualified under WDCA 361(1) merely because it would be a crime for them to perform jobs for which they lack licensing (i.e., a "green card"), then *all* injured workers are disqualified under WDCA 361(1), because it would be a crime for them too to perform jobs for which they lack licensing.

To avoid this absurd result, WDCA 361(1) should not be extended by implication to cases where disqualification is claimed, not because of *past* commission of a crime, but because lack of a work license creates the potential for *future* commission of a crime.

c. New Crimes

Where a statute incorporates another jurisdiction's law by reference, that reference is limited to the other law *as it then existed*, not as subsequently amended. *Walton Bean Co v UCC*, 308 Mich 636, 654 (1944); *Radecki v Workers Compensation Director*, 208 Mich App 19, 23 (1994); *People v Urban*, 45 Mich App 255, 262 (1973). The reason for this rule was stated in *Lievense v UCC*, 335 Mich 339, 342 (1952):

> If...future acts of congress...could change the liability of a Michigan employer, then the Michigan act in question would to that extent be an unconstitutional delegation of legislative authority to congress.

This would be the precise result if the crime exclusion of WDCA 361(1) were construed to include, not merely acts that were Federal crimes as of July 30, 1985 (the effective date of the crime exclusion), but also things that were criminalized thereafter.

> A statute should be interpreted, if fairly possible, to free it of not insubstantial constitutional doubts.

Lynch v Overholser, 369 US 705, 711; 8 L Ed 2d 211; 82 S Ct 1063, 1067 (1962). Accord, *Workman v DAIIE*, 404 Mich 477, 507 (1979); *Lievense v UCC, supra* at 335 Mich 342.

Consequently, either

a) The crime exclusion should be struck down as an unconstitutional delegation of power by Michigan's Legislature to Congress; or

b) to remove "not insubstantial constitutional doubts," "crime" as used in WDCA 361(1) should be limited to things that were crimes when the exclusion was added to the Act.

d. Federal Crimes

Just as the unadorned words "aliens," "contract," and "work" include all things in their class, so also would the word "crime" in WDCA 361(1) normally include Federal offenses. However, as noted, since the Legislature is presumed to intend that its enactments be constitutional, statutes should be construed, if possible, to remove "not insubstantial constitutional doubts."

A Michigan statute stating, for instance, "Anyone who commits a felony as defined by Congress shall be imprisoned for not less than one year" would plainly be invalid as a delegation of the Michigan Legislature's sole prerogative to set Michigan penal law. There is no logical basis for any different result where the Michigan Legislature adds

forfeiture of workers compensation as a penalty for violating Federal law. That is precisely what the last sentence of WDCA 361(1) would do, if "crime" were construed to include *Federal* crimes.

Consequently, either

a) WDCA 361(1) should be struck down as an unconstitutional delegation of power by Michigan's Legislature to Congress;[13] or

b) to remove "not insubstantial constitutional doubts," "crime" as used in WDCA 361(1) should be limited to *Michigan* crimes.

e. Mode of Proof

WDCA 361(1) provides that "commission of a crime" is disqualifying, but is silent on *how one proves* commission of a crime. There are three possibilities:

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Colony Town Club v UCC, 301 Mich 107, 113-114 (1942) (Michigan unemployment compensation statute purporting to incorporate Federal Social Security Act's definition of "employment" was an unconstitutional delegation of state power). *Taylor v Gate Pharmaceuticals*, 468 Mich 1 (2003) (which held that a Michigan statute could constitutionally immunize drug manufacturers from product liability where FDA standards are met) is distinguishable in that, while adopting Federal standards makes sense in cases involving matters of Federal concern (which interstate commerce in products certainly is), construing "crime" to include Federal crimes would amount to abdicating to Congress in not one, but two areas of traditional state concern:

a) the authority to define state crimes, which is an essence of the police powers retained by the states; and

b) the authority to provide compensation to workers injured within the state, which has been recognized as a matter of state concern. *Pacific Employers Ins Co v Industrial Accident Comm'n*, 306 US 493, 83 L Ed 940, 59 S Ct 629 (1939) (California has interest in assuring compensation for even noncitizens injured within its borders).

A. Apply civil standards. However, if criminal law and procedure are not applied to the issue, inevitably there will be workers found "guilty" by a workers compensation magistrate who would *not* be found guilty in a criminal trial. That would create three problems:

- It would create a *new species* of crime, consisting of acts that the workers compensation system (applying lesser standards of proof and fewer procedural safeguards) considers crimes, but the criminal justice system does not.
- It would amount to a new definition of a word already having an established meaning,[14] contrary to the rule that, when a statute uses a term of art, the meaning of the term of art is presumed to be intended. MCL 8.3a.
- It would create the anomaly of workers compensation magistrates "convicting" workers the criminal justice system has acquitted (a criminal acquittal not being *res judicata* in workers compensation proceedings because of differing parties).

It is hard to believe that the Legislature intended any such results.

B. Apply the full panoply of criminal law and procedure, such as proof beyond a reasonable doubt, the right of confrontation, the entrapment defense, the Fifth Amendment privilege, refusing to draw inferences from assertion of that privilege, excluding confessions not admissible absent independent proof of the corpus delicti, and

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[14] The criminal code already defines "crime." See MCL 750.5

other rules limiting use of evidence in criminal cases. This would require workers compensation magistrates and appellate commissioners to become as knowledgeable about criminal law as circuit judges, and would make comp cases as drawn out as criminal trials. Here again, it is hard to imagine that the Legislature intended any such thing.

C. Defer to the criminal justice system. The only conclusion that avoids the difficulties created by both the foregoing scenarios is to construe "commission of a crime" as meaning a crime *as determined by the criminal justice system.* Since there is no commission of a crime in that sense unless and until a conviction has been entered, it follows that only a worker convicted of a crime can be disqualified by WDCA 361(1). *Weathersby v Grand Rapids, supra* (noting that merely being charged with a crime is not disqualifying).

In short, "commission of a crime" is ambiguous, in that it does not specify what standards apply to determine that question. Both the liberal construction to which remedial statutes like the Worker's Compensation Act is entitled, and ensuring smooth functioning of the worker's compensation system call for requiring that it be determined by the criminal justice system whether the worker committed a crime.

C. APPLICATION OF LAW TO FACTS OF *SANCHEZ*

1. DEFENDANT FAILED TO PROVE THAT SANCHEZ COMMITTED A CRIME

Since WDCA 361(1) is an affirmative defense, the burden of proving that it applies is on the employer. *Sweatt v MDOC*, 2000 WCACO __, 13 MIWCLR 1518 (No 114, Feb.

29), aff'd 247 Mich App 555 (2001), rev'd on other grds 468 Mich 172 (2003).

Defendant's post-trial brief claimed three (3) crimes allegedly committed by Sanchez: 42 USC 408(a)(7)(B) (using false Social Security number), 8 USC 1324a(a) (working in U.S. illegally), and 8 USC 1324a(b)(2) (false I-9 attestation).[15] However,

1. The disqualification provision was added to WDCA 361(1) in *1985*, whereas the statutes cited from 8 USC were adopted as part of the Immigration Reform & Control Act (IRCA) of *1986*. The Michigan Legislature could not have intended to disqualify workers for commission of crimes that had not yet been invented; and (as previously explained) any attempt to do so would be an unconstitutional delegation to Congress of the authority to amend Michigan's statutes.

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It would be improper to consider any additional alleged crimes, because

a) Crimes not alleged at the trial level were waived (*Jones v Autoalliance Int'l*, 1994 WCACO 228, 229 (No. 55, Jan. 28); *Calovecchi v Michigan*, 461 Mich 616, 626 (2000) (courts lack authority to decide questions not raised before the WCAC).

b) The authority of judges to take judicial notice of laws does not supersede a party's due process right to know what crimes he is being charged with. Telling the plaintiff only after the case has been tried does not cut it.

c) While judicial notice would permit a court to complete an alleged violation by tacking a statutory citation on it, it does not permit a court to cut new charges and allegations of statutory violations out of whole cloth, as was done in the cases at bar. The latter amounts to the judge improperly acting as an advocate for one of the parties.

d) Even if one were to endorse the magistrate's improper reliance on laws Defendant did not argue that Plaintiff violated, some (unauthorized entry of U.S.) were not proven, others (being in the U.S. illegally, working in the U.S., working without a valid Social Security number) are not crimes (as we shall see); others (possessing a fake Social Security card) had nothing to do with Sanchez' termination; and none were violations of Michigan law.

2. 8 USC 1324a(a) makes it illegal to *knowingly* employ an undocumented alien. However, Defendant insists that it did not know Sanchez was undocumented until it confronted Plaintiff on August 6, 1999 and immediately terminated him. Since there was no employment of Sanchez *while knowing he was undocumented*, there was no violation of 8 USC 1324a(a).

3. Apart from that, 8 USC 1324a(f)(1) imposes criminal penalties for employing an undocumented alien only on the *employer. The worker* commits no "crime" by working illegally, and (as previously noted) *someone else's* commission of a crime is insufficient to disqualify a worker under WDCA 361(1).

4. While violation of 8 USC 1324a(b)(2) (false attestation of one's residency status) is a felony, *mens rea* is still an element of criminal liability. That element was not satisfied in this case, since the I-9 was filled out by another, and Sanchez could not read the form (which was in English).

5. Defendant did not allege that Sanchez was charged, let alone convicted, of any of the supposed crimes. As noted, unless magistrates are to become criminal judges, a conviction is a *sine qua non* of disqualification.

6. All the cited statutes are *Federal* ones. As noted, WDCA 361(1) would be unconstitutional if it were construed to permit Congress to define who gets Michigan worker's compensation.

In short, Defendant failed to carry its burden of proving commission of a "crime" as

defined in WDCA 361(1).

2. THE ALLEGED CRIMES WERE NOT THE LEGAL CAUSE OF SANCHEZ'S UNEMPLOYMENT

If we were to ignore criminal standards of proof, and permit consideration of Federal statutes, the only alleged crime for which there was evidentiary support was 42 USC 408(a)(7)(B) (use of false Social Security number). There is no evidence that this had anything *at all* to do with loss of the West Michigan Steel job, which Sanchez quit because his work-related injury did not permit him to continue (32b).

As for loss of the Eagle Alloy job, while there was evidence that the bad Social Security number had something to do with Sanchez' termination (6b), the evidence showed that *another* reason for Sanchez's termination was his being an illegal alien (10b, 11b). Being an illegal alien is punishable only by deportation, which is a civil, not a criminal penalty. *Santelises v INS*, 491 F 2d 1254, 1255-1256 (1973); *Harisiades v Shaughnessy*, 342 US 580, 594; 96 L Ed 586, 601; 72 S Ct 512, 521 (1952); *US ex rel Bilokumsky v Tod*, 263 US 149, 154; 68 L Ed 221; 44 S Ct 54 (1923).[16]

We thus have a situation in which a worker was fired for *two* reasons, one arguably a crime, the other not. This conundrum is resolved by rules of construction: As previously noted, because remedial statutes like the Workers Compensation Act are

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16 Otherwise, aliens would be entitled to the full panoply of Constitutional protections, such a trial by jury, right to counsel, proof beyond a reasonable doubt, etc.

liberally construed, and penalties narrowly construed, commission of a crime is not disqualifying unless it was "the one most immediate, efficient, and direct cause" of the unemployment. In Sanchez' case, since the alleged crime was only one of two causes, it was not the one most immediate cause of the termination, hence not disqualifying.

3. EVEN ASSUMING A CRIME CAUSED THE TERMINATION, IT DID NOT FORECLOSE ALL WORK

Even if we were to define "crime" broadly, and adopt a pro-employer definition of "because of," as noted commission of a crime is not disqualifying unless it precludes the worker from obtaining or performing *any* work . Defendant did not prove that Sanchez's termination from Eagle Alloy had that effect. On the contrary, Sanchez's return to work on December 15, 1999 affirmatively showed that any alleged crime did not preclude Sanchez from performing *all* work.

Finally, even if we pretended that Sanchez's commission of a crime foreclosed all jobs *in the U.S.*, there was no evidence that they would render Sanchez unable to obtain or perform work *in Mexico.*[17]

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[17] Unless we are to rewrite the statute, not only by inserting "all" before "work," but also by inserting "domestic" after "all."

D. APPLICATION OF LAW TO FACTS OF VAZQUEZ

1. DEFENDANT FAILED TO PROVE THAT VAZQUEZ COMMITTED A CRIME

Defendant's post-trial brief claimed four (4) statutes allegedly violated by Vazquez: 8 USC 1182(a)(6)(A)(i) (being in the U.S. illegally); 8 USC 1201(b) (nonregistration by one applying for a visa); 8 USC 1301 (nonissuance of visas unless registered); and 8 USC 1306(d) (forging an alien receipt card).[18] However,

1. As previously noted, being in the U.S. illegally is a deportable offense, not a crime.

2. Reliance on the visa statutes is misplaced, since there was no evidence Vazquez applied for a visa, nor any showing that violations of the visa statutes are criminal offenses.

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[18] It would be improper to consider any additional alleged offenses because,

a) Offenses not alleged at the trial level were waived. *Jones v Autoalliance Int'l*, supra at 1994 WCACO 229; *Calovecchi v Michigan*, supra at 461 Mich 626 (2000);

b) A judge acts as an advocate rather than a neutral decisionmaker when he disqualifies for offenses neither party has seen fit to raise or allege; and

c) Even if one were to consider additional violations, some (unauthorized entry of U.S.) were not proven, others (being in the U.S. illegally, working in the U.S. illegally, working without a valid Social Security number) are not crimes (as we have seen); others (possessing a fake Social Security or resident alien card) had nothing to do with Vazquez's termination; and none were violations of Michigan law.

The WCAC plurality's consideration of unalleged offenses was still more egregious, considering not only offenses that had been waived by not raising them at the trial level, but also offenses that had been waived by not alleging them at the appeal level either. Considering the latter violated both WDCA 861a(11) (WCAC may consider only issues raised by the parties), and *Crampton v Department of State,* 395 Mich 347, 351 (1975) (litigant has constitutional right to unbiased decisionmaker).

3. There was no evidence that Vazquez forged an alien receipt card; on the contrary, he purchased a resident alien card (not shown to be an alien receipt card) forged by someone else.

4. Defendant did not allege that Vazquez was charged, let alone convicted, of any of the supposed crimes. As noted, unless magistrates are to become criminal judges, a conviction is a *sine qua non* of disqualification.

5. All the cited statutes are *Federal* ones. As noted, WDCA 361(1) would be unconstitutional if it were construed to permit Congress to define who gets Michigan worker's compensation.

In short, Defendant failed to carry its burden of proving commission of a "crime" as defined in WDCA 361(1).

2. ANY ALLEGED CRIMES WERE NOT THE LEGAL CAUSE OF VAZQUEZ'S UNEMPLOYMENT

a. Alleged commission of a crime was not a cause *at all* of Vazquez's termination

The magistrate found, as a fact, that Vazquez's unemployment from April 7 to October 16, 1999 was not due to commission of any crime (71a), and consequently awarded wage-loss benefits through the latter date. The WCAC reversed and held that Vazquez was disqualified by WDCA 361(1) from his last day of work on April 7, 1999, and so denied all wage loss benefits.

Assuming for the moment that the WCAC had the authority to set itself up as the

trier of fact on this point, its finding was unsupported by "any competent evidence." The uncontradicted evidence (most of it coming from Defendant's own records and witnesses) is that Vazquez was terminated on April 7, 1999 because of attendance violations, period. There is no evidence that he was terminated for any other reason.[19] Although Vazquez was an undocumented alien at the time, there is no evidence that Defendant knew or suspected that fact. On the contrary, the first inkling Defendant had that something was amiss was the Social Security Administration's June 16, 1999 letter that a number of Social Security numbers (among them Vazquez's) were inaccurate. Since numbers can be mistranscribed, not even that was notice of Vazquez's undocumented status. Rather, Defendant had no knowledge of the latter until October 16, 1999, when Vazquez's counsel admitted to Defendant's counsel that Vazquez was an undocumented alien (43b).

Since an act cannot be motivated by a fact the actor is unaware of, it is not even logically possible for Defendant to have terminated Vazquez (or refused to rehire him) before October 16, 1999 because of his undocumented status. Since there was not "any competent evidence" that Plaintiff's unemployment prior to October 16, 1999 was "because of" commission of a crime, the Court of Appeals correctly reversed the WCAC's

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19 The lack of causal relation to Vazquez's termination renders moot the question of whether Plaintiff committed any crimes in obtaining employment at Eagle Alloy.

denial of wage-loss benefits prior to that date.[20]

b. Defendant's discovery of Vazquez's undocumented status is immaterial

If Defendant had testified, "we intended to call Vazquez back to work, until we found out he was undocumented," that might support a finding that undocumented status had something to do with Vazquez's unemployment after that point. In fact, however, the evidence was the opposite: Defendant's agent admitted that it had a policy of not calling terminated workers back to work:

> Q. Please tell me what efforts you made to provide Mr. Vazquez with suitable work after he was fired in April of 1999 and before you received notice...that Mr. Vazquez was an illegal.
>
> A. None.
>
> Q. So...it was your impression that he was a legal resident of this country at the very least until June of 1999 when you received this letter from Social Security, and you did nothing to provide him with favored work. Correct?
>
> A. Correct... We terminated him for attendance; and if we terminate somebody for attendance, *we do not rehire them.*

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[20] Even if we were to pretend there were competent evidence of causal relationship, the existence of "substantial evidence" of lack of causal connection between Vazquez's unemployment and any alleged crime prior to October 16, 1999 makes the WCAC's ruling to the contrary a violation of WDCA 861a(3):

> ...findings of fact made by a worker's compensation magistrate shall be considered conclusive by the commission if supported by competent, material and substantial evidence...

> Q. So as a matter of course, once someone is terminated, then it's your company policy that all efforts to provide favored work cease. Correct?
>
> A. Correct. (44b-45b; emphasis added).

Consequently, any alleged crime allegedly committed by Vazquez is not a cause *at all* of his not being employed at Eagle Alloy. Perforce, alleged crimes were not "the one most immediate cause" of Vazquez's unemployment.

c. Loss of the Olsten jobs was not "because of" commission of a crime

From July, 1999 into March, 2000, Vazquez went through a succession of temporary jobs through Olsten. Since Vazquez left the first of these because of his shoulder problem, there is no basis for arguing that he lost that job because of commission of a crime.

The reason Vazquez left the remaining jobs does not appear in the record. Since WDCA 361(1) disqualification is an affirmative defense, on which the employer has the burden of proof (*Sweatt v MDOC, supra*) Defendant's failure to prove why Vazquez left the subsequent jobs means that Defendant failed to carry its burden of proving that the loss of the subsequent jobs was "because of" commission of a crime.

As for Vazquez' termination from Olsten (sometime between March and July, 2000), the only evidence as to the reason was Vazquez's testimony that the termination letter cited Vazquez's illegal status (38b). As noted, being an illegal or undocumented alien, while a deportable offense, is not a crime. Since the only reason for termination from

Olsten for which there is record evidence is an act (or more precisely, a status) that is not a crime, perforce Vazquez's termination from Olsten was not because of commission of any crime.

Even if we were to speculate that IRCA's prohibition on employing undocumented aliens was *another* reason Olsten fired Vazquez (though there was no evidence of such),

a) Since Olsten did not employ Vazquez after learning he was undocumented, and the statute requires *knowing* employment, the statute was not in fact violated, *there was no crime committed*, and consequently the termination could not be because of commission of a crime.[21]

b) Even if we were to pretend the crime of employing an undocumented alien were committed, it would have been committed by the employer, not by Vazquez. As already noted, only commission of a crime *by the worker* is disqualifying.

c) As noted, termination in part because of commission of a crime, in part because of something that is not a crime, is not disqualifying. Consequently, if Olsten terminated Plaintiff both because he was undocumented (not a crime) and because it would be a crime to retain an undocumented alien, Vazquez would not be disqualified.

d. Loss of Post-Olsten jobs was not because of commission of any crime

The evidence was undisputed that Vazquez left the Kelly Services job in July, 2000

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[21] As previously noted, it is only unemployment due to an *already committed* crime that is disqualifying.

because it bothered his shoulder (39b). The evidence was undisputed that Vazquez left the Wise Temporary Services job in November, 2000 because of lack of work (40b). There being no evidence that Vazquez lost these jobs because of commission of a crime, there is likewise no basis for disqualifying Vazquez upon leaving these jobs.

3. CONCLUSION

All the evidence shows that Vazquez's periods of unemployment after April, 1999 were due to his work-related injury, routine layoffs, unknown reasons (which work against the employer having the burden of proof) or (in the case of termination from Olsten) a status that is not "commission of a crime." There being no evidence that commission of a crime had *anything* to do with Vazquez's periods of unemployment or underemployment, the lower tribunals erred as a matter of law in disqualifying Vazquez from receipt of wage-loss benefits.[22]

V. DEFENDANT IS NOT ENTITLED TO OFFSET REDEMPTIONS PAID BY OTHER EMPLOYERS

Workers compensation benefits may not be reduced by (i.e., do not coordinate with) other benefits, unless the Act expressly so provides. This follows from WDCA 811:

> ...nor shall benefits derived from any other source than those paid or caused to be paid by the employer as provided in this

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22 At the risk of beating a dead horse, note that, even if there were evidence that Vazquez committed a crime that foreclosed some hypothetical job, his performance of multiple jobs post-injury proves conclusively that no such crime foreclosed *all* jobs, as required by WDCA 361(1).

> act, be considered in fixing compensation under this act, except as provided in sections 161, 354, 358, 821, and 846.

In addition to the cited sections (none of which are applicable), it has been held that WDCA 811 itself authorizes an employer to reduce compensation by payments *it* has made. *Thick v Lapeer Metal Products,* 419 Mich 342, 349 (1984). However, in the case at bar, the redemptions paid by the other employers were not "paid or caused to be paid" by Defendant.

WDCA 846 provides for coordination between comp paid by a *Michigan* employer and a *foreign* employer. Though inapplicable, this statute tends to negate the offset Defendant seeks. It is a familiar rule of construction that to say one thing is to exclude another. By expressly providing for an offset of foreign comp, without providing for a similar offset of domestic comp, the implication is that no offset of domestic comp was intended.

In short, since WDCA 811 prohibits coordination unless expressly authorized, and Defendant has pointed to no section of the act authorizing the offset it seeks, Defendant is not entitled to offset the redemptions paid by other employers. *Cf. Rahman v Detroit Board of Education,* 245 Mich App 103, 120-121 (2001), lv den 464 Mich 872 (2001) (Second Injury Fund not entitled to subtract pension benefits, since they were not paid or caused to be paid by the SIF).

RELIEF REQUESTED

Workers Compensation is supposed to be a no-fault system, with compensation payable, not because the employer is bad or the worker is good, but because injured workers need to be taken care of, and it makes more economic sense to cast that burden on the employer who benefitted from the worker's labor. Since disqualifying misconduct rules contradict the Act's basic purpose, they should be narrowly construed.

Doing that in the case at bar, WDCA 361(1) disqualification applies only where a worker is rendered unable to do any work solely because of conviction of a Michigan crime. In the case at bar, since neither plaintiff was convicted of anything; the crimes they are accused of are all Federal; and the alleged crimes did not foreclose all work to

plaintiffs; the Court of Appeals erred in disqualifying the plaintiffs.

The Court should therefore reinstate the WCAC's award of benefits in Sanchez, and open the award of wage-loss benefits that was incorrectly closed in Vazquez. The Court should also affirm the magistrates' award of medical benefits in both cases, and rule in Vazquez that Defendant is not entitled to coordinate workers compensation received from other Michigan employers.

Respectfully submitted,

McCROSKEY, FELDMAN,
COCHRANE & BROCK, P.C.

DATED: March 18, 2004

By: _____
Gary T. Neal (P 32033)
Attorneys for Plaintiff Sanchez

LIBNER, VanLEUVEN, EVANS,
PORTENGA & SLATER, P.C.

DATED: March 22, 2004

By _____
John A. Braden (P29645)
Attorneys for Plaintiff Vazquez

Decedent drowned in an unwitnessed accident, with no indication of trauma or other injury. However, he was subject to epileptic seizures, and this might have caused the accident. The cause of the fall into the water was held to be immaterial normally, since Wisconsin follows the "positional risk" or "increased hazard" doctrine. In this case the cause was material, since decedent had made false representations about his condition on his employment application. Therefore no benefits would be payable if the accident was due to a seizure.

§ 47.54 Miscellaneous grounds of illegality

As in the case of the defense of "violation of law,"[26] so in the case of "illegal employment" there are the usual attempts to stretch the defense out of all relation to its essential purpose. The most extreme example is that of the miner who, in his zeal to get out of the compensation act and into a common-law court, contended (unsuccessfully) that his employment became illegal and ceased at the moment his employer failed to pump into the mine the amount of air required by statute.[27] A similar contention, equally unsuccessful, was the argument that the employment of a taxi driver was terminated for illegality by his operating his cab in excess of the speed limit.[28] Texas, until it amended its compensation act, had a struggle with its Sunday statute, which makes contracts calling for work on Sunday illegal and void.[29]

Blain, 140 Tex. 541, 168 S.W.2d 854 (1943).

But when the violation did not contribute to the injury, breach of a hiring prohibition in a health and safety statute did not defeat compensation. Gunnoe v. Glogora Coal Co., 93 W. Va. 636, 117 S.E. 484 (1923).

[26] *See* § 35 *supra*.

[27] Gunnoe v. Glogora Coal Co., 93 W. Va. 636, 117 S.E. 484 (1923).

[28] Plick v. Toye Bros. Auto & Taxicab Co., 13 La. App. 525, 127 So. 59 (1930).

Wisell v. Jorgensen, 136 Vt. 604, 398 A.2d 283 (1979). A 17-year-old repairman and test driver of motorcycles was injured in a collision with a fellow employee. He received workmen's compensation benefits, but attempted to maintain an action for damages against his employer. The plaintiff maintained that his contract of employment was illegal because, as the holder of a junior operator's licence, he was not entitled to operate a motor vehicle in the course of his employment. The court granted the employer's motion for summary judgment, holding that the employer was at most in violation of a highway traffic regulation, which conduct would not be enough to void the employment contract.

[29] Maryland Cas. Co. v. Garrett, 18 S.W.2d 1102 (Tex. Civ. App. 1929). The Texas Act has now been amended to cover "work or service in violation of any

Apparently the week-end employment remained valid for compensation purposes even though Sunday employment was also included in the contract.[30] Wisconsin has felt even less hampered by its Sunday statute. If the contract is void because made on Sunday, an implied contract will be raised to take its place.[31] And violation of a Sunday law in the performance of the contract is immaterial if it did not causally contribute to the accident.[32]

wage law, hour law or Sunday law." Tex. Rev. Civ. Stat. Ann. art. 8309, § 1 (Vernon's Supp. 1943).

[30] Maryland Cas. Co. v. Ham, 22 S.W.2d 142 (Tex. Civ. App. 1929).

[31] Wausau Lumber Co. v. Industrial Comm'n, 166 Wis. 204, 164 N.W. 836 (1917).

[32] Frint Motorcar Co. v. Industrial Comm'n, 168 Wis. 436, 170 N.W. 285 (1919).